

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

MONTEZ O. WALKER,	:	
	:	NO. 1:05-CV-00103
Petitioner,	:	
	:	
	:	
v.	:	<b>OPINION AND ORDER</b>
	:	
	:	
DEB TIMMERMAN-COOPER,	:	
	:	
Respondent.	:	
	:	

This matter is before the Court on the Magistrate Judge's October 5, 2006 Report and Recommendation (doc. 7). Petitioner filed no objection. For the reasons indicated herein, the Court ADOPTS the Magistrate Judge's Report and Recommendation in all respects, and DENIES Petitioner's Petition for Writ of Habeas Corpus.

The Magistrate Judge provided a thorough factual background, which the Court will summarize. On March 4, 2002, the Hamilton County, Ohio, grand jury indicted Petitioner on one count of trafficking in cocaine, and one count of possession of cocaine (doc. 7). On January 29, 2003, A jury found Petitioner guilty on the trafficking offense but acquitted him on the possession charge (Id.). The court sentenced him to a nine-year term of imprisonment for the trafficking offense (Id.). The Ohio Court of Appeals affirmed Petitioner's conviction (Id.). Petitioner was advised of his right to appeal to the Ohio Supreme Court, but he ultimately

did not appeal in a timely fashion, and the Ohio Supreme Court dismissed his case without opinion (Id.).

Petitioner subsequently filed this federal habeas corpus action, premised on the grounds that his conviction was based on insufficient evidence and is against the manifest weight of the evidence (Id.). Respondent argues in the return of writ that Petitioner waived his claims due to procedural default in failing to file a timely appeal to the Supreme Court of Ohio (Id.). Respondent further argues that Petitioner's manifest weight of the evidence claim is not cognizable in this federal proceeding, and that the sufficiency of the evidence claim should be denied as meritless (Id.).

After reviewing the petition, the Magistrate Judge issued his Report and Recommendation, finding Respondent's arguments well-taken that Petitioner had waived his claims for relief due to his procedural default in state court, and alternatively, that Petitioner is not entitled to relief based on the merits of his claims challenging the weight and sufficiency of the evidence (Id.). The Magistrate Judge therefore recommended that the petition be denied with prejudice, but that a certificate of appealability should issue, and that the Court should permit Petitioner to proceed in forma pauperis on appeal (Id.). Petitioner was afforded proper notice of the Magistrate Judge's Report and Recommendation as required by 28 U.S.C. § 636(b)(1)(C),

including notice that failure to file timely objections to the Report and Recommendation could result in a waiver of further appeal. See United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). Petitioner filed no objection.

In accordance with 28 U.S.C. § 636(b), the Court has reviewed the Magistrate Judge's Report and Recommendation de novo, finding it thorough and well-reasoned. The Court finds correct the Magistrate Judge's conclusion that Petitioner procedurally defaulted in the state court system; accordingly, his petition is barred pursuant to 28 U.S.C. § 2254(b)(1)(c). Moreover, the Court agrees that Petitioner's "manifest weight of the evidence" claim alleged in Ground One of the petition raises a state law issue not cognizable in a federal proceeding. Finally, the Court finds that Petitioner has not demonstrated as alleged in Ground Two of the petition that the evidence is insufficient to support his drug trafficking conviction under Ohio Rev. Code § 2925.03(A)(2).

Having reviewed this matter, the Court finds the Magistrate Judge's Report and Recommendation well-taken. Accordingly, the Court hereby ADOPTS IN ENTIRETY the Magistrate Judge's Report and Recommendation (doc. 7). The Court further DENIES WITH PREJUDICE Petitioner's Petition for Writ of Habeas Corpus (doc. 1), and FINDS that a certificate of appealability should issue with respect to the constitutional claim alleged in Ground Two challenging the sufficiency of the evidence, which this

Court has concluded is barred from review on waiver grounds, because under the two-part standard enunciated in Slack v. McDaniel, 529 U.S. 473, 484-85 (2000), "jurists of reason" would find it debatable whether this Court is correct in its procedural ruling and whether Petitioner has stated a viable constitutional claim for relief. However, a certificate of appealability should not issue with respect to the state-law claim alleged in Ground One of the petition, which the Court concludes is also procedurally barred from review, because under the second prong of the Slack standard, "jurists of reason" would not find it debatable whether Petitioner has stated a viable constitutional claim in that ground for relief. Id. Finally, the Court CERTIFIES pursuant to 28 U.S.C. § 1915(a)(3), that with respect to any application to proceed on appeal in forma pauperis, an appeal of this Order would be taken in good faith, and therefore the Court GRANTS Petitioner leave to appeal in forma pauperis upon a showing of financial necessity. See Fed. R. App. P. 24(a); Kincade v. Sparkman, 117 F.3d 949, 952 (6<sup>th</sup> Cir. 1997).

SO ORDERED.

Dated: November 7, 2006

/s/ S. Arthur Spiegel  
S. Arthur Spiegel  
United States Senior District Judge